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No. 86-1990

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

WEST 14TH STREET COMMERCIAL CORP.,
WEST 14TH STREET GARAGE CORP., and
WEST 14TH STREET LAUNDRY CORP.,

Petitioners,

vs.

5 WEST 14TH OWNERS CORP.,

Respondent.

MOTION FOR LEAVE TO FILE BRIEF OF THE COUNCIL FOR OWNER-OCCUPIED HOUSING, INC. AS *AMICUS CURIAE*, AND BRIEF OF *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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MOTION OF THE COUNCIL FOR OWNER-OCCUPIED HOUSING, INC. FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

The Council for Owner-Occupied Housing, Inc. (the "Council") hereby moves, pursuant to Rule 36.1 of the Rules of this Court, for leave to file the attached brief as *amicus curiae* in support of the petition of West 14th Street Commercial Corp., West 14th Street Garage Corp. and West 14th Street Laundry Corp. (collectively, the "West 14th Street Corps.") for a writ of certiorari to the United States Court of Appeals for the Second Circuit. By letters dated July 2, 1987, the Council, through its attorneys, requested that the parties consent to the filing of the attached brief. Whereas petitioners West 14th Street Corps., in a letter dated July 7, 1987, consented to such filing, respondent 5 West 14th Owners Corp. refused to give the requested consent in a letter dated July 7, 1987.

The Council is a not for profit corporation located in New York State. The members of the Council include, among others, individuals and partnerships which own residential buildings that have been in the past, and will be in future, converted to cooperative or condominium status. The Council has previously sought to assert or define the rights of its constituency in legal proceedings. *See, e.g., Council for Owner-Occupied Housing, Inc. v. Abrams*, 133 Misc. 2d 574 (Albany Co. 1986), *aff'd*, 125 A.D.2d 10 (3d Dept. 1987); *Council for Owner-Occupied Housing, Inc. v. Koch*, 119 Misc. 2d 241 (N.Y. Co. 1983), *aff'd*, 61 N.Y.2d 942 (1984).

The decision of the Second Circuit in this action has an immediate impact on the interests of the Council's members. It has been a familiar practice for many years in New York State to convert residential buildings to cooperative housing. Indeed, for the past five years, an average of 513 offering plans for cooperative conversions and developments involving an average of 46,695 apartments have been accepted for filing in the New York State Attorney General's Office.

The decision of the Second Circuit will significantly affect the practices of sponsors, whose interests the Council seeks to represent, in converting or developing property for cooperative housing. Among other things, the decision may increase the cost of cooperative conversions for both sponsors and tenants by requiring sponsors to use more complex methods of retaining a fee interest in a converted property, such as "condops", rather than entering into a simple leasing agreement. Moreover, the negotiation strategy of both sponsors and tenant groups will change, and as the Second Circuit decision has the effect of discouraging such negotiations, neither party will be able to reach the best bargain.

The most detrimental effect of the decision in this action is that it has injected uncertainty into the practice of cooperative conversion and development. As *The New York Times* recently reported, tenant associations and cooperative corporations are already planning to expand the scope of the decision of the Second Circuit by commencing numerous and varied lawsuits. Thus, the decision raised more questions than it resolved. Under such circumstances, sponsors need firm guidance from this Court so that their rights and interests may be adequately served and protected.

The Council therefore respectfully moves for leave to file the attached brief as *amicus curiae* in order to present to this Court its views and the views of its members in this important case.

Respectfully,

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BRIEF OF THE COUNCIL FOR OWNER-OCCUPIED HOUSING, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

The Council for Owner-Occupied Housing, Inc. (the "Council") respectfully submits this brief, as *amicus curiae*, in support of the petition of West 14th Street Commercial Corp., West 14th Street Garage Corp. and West 14th Street Laundry Corp. (collectively, the "West 14th Street Corps.") for a writ of certiorari to be issued to review the judgment and opinion of the United States Court of Appeals for the Second Circuit, entered in the above-captioned proceeding on March 18, 1987, and reported at 815 F.2d 188. The Council submits this *amicus curiae* brief pursuant to its attached motion for leave to file because respondent 5 West 14th Owners Corp. has informed the Council that it would not consent to the filing of this brief by letter dated July 7, 1987. Petitioners, however, did consent to such filing in a letter also dated July 7, 1987.

THE INTEREST OF *AMICUS CURIAE*

The interest of *amicus curiae* is forth in the motion attached to this brief.

INTRODUCTION

In interpreting Section 3607 of the Condominium and Cooperative Abuse Relief Act of 1980 (the "1980 Act"), 15 U.S.C. §3607, the Court of Appeals for the Second Circuit has significantly affected the future development of cooperative housing in this country. With approximately 95% of all existing cooperative housing units located in New York City, the Second Circuit's construction of Section 3607 has a direct and immediate impact on virtually all such housing in the United States. Moreover, as one of the few courts to interpret Section 3607 of the 1980 Act, the Second Circuit will influence cooperative housing development outside New York City because future judicial analysis of the statute will undoubtedly rely on, or at least be based on, the decision of the Second Circuit in this action. Under these circumstances, it is appropriate for this Court to review a decision of such clear importance, especially as there are serious questions whether the Second Circuit correctly interpreted Section 3607 of the 1980 Act.

In essence, the Second Circuit rewrote Section 3607 by construing the term "contract" as used therein to include "leases of cooperative owned property to a sponsor affiliated company". Such interpretation violates the Congressional intent that contracts and leases be treated differently under the 1980 Act, an intent manifested by the fact that Congress dealt separately with leases in the very next provision of the 1980 Act – Section 3608. If the 1980 Act did not, on its face, redress perceived abuses resulting from the types of leases at issue here, Congress, not the Second Circuit, should take action to cure the deficiency in the Act.

Moreover, assuming the Second Circuit correctly interpreted the term "contract" in Section 3607, the court wrongly applied

the statute here. Even as interpreted by the Second Circuit, Section 3607 simply could not apply to the leases at issue in this action because state law effectively prevented the sponsor from exercising the requisite "special developer control" over the cooperative corporation. The Second Circuit erred by failing to give *any* weight to New York's statutory scheme governing cooperative conversions, which in practice prevents sponsors from unilaterally imposing the terms of a conversion on existing tenants, especially as the 1980 Act was intended to be compatible with state laws protecting of purchasers of cooperative units.

It is already evident that the Second Circuit's construction and application of Section 3607 of the 1980 Act will give rise to a flood of litigation concerning even further interpretation of the statute, a result that the court sought to avoid. Before the state and federal courts are embroiled in a case-by-case elaboration of the Second Circuit's decision in this action, this Court should determine whether the Second Circuit correctly interpreted and applied Section 3607 of the 1980 Act in the first instance. The Council therefore respectfully requests that the petition of the West 14th Street Corps. for a writ of certiorari be granted.

REASONS FOR GRANTING THE WRIT

I. *Section 3607, As Interpreted by the Second Circuit, Substantially Affects Cooperative Housing Development*

The significance of the decision of the Second Circuit in this action cannot be questioned. At the time of the adoption of the 1980 Act, New York City contained 95% of the cooperative housing units in the United States. *See* Note, *Examining Cooperative Conversion: An Analysis of Recent New York Legislation*, 11 Fordham Urb. L.J. 1089, 1089 (1982-83) (herein after cited as "Cooperative Conversion"). In 1980 alone, over 750 offering plans for cooperative and condominium developments were submitted to the New York Attorney General's Office pursuant to New York's Martin Act, N.Y. Gen.

Bus. Law §§352-e to 352-eeee (McKinney 1984 and Supp. 1987). *Id.* at 1093 n.38. Approximately 600 of these plans involved cooperative conversions. *Id.*

Since the adoption of the 1980 Act, the development of cooperative housing has continued to grow in New York City. The following chart shows, according to each borough of New York City, the number of residential cooperative development and conversion plans submitted to and accepted by the New York State Attorney General's Office and number of apartment units involved for the years 1981 through 1986.[1]

MANHATTAN: Plans/Units

	Submissions	Acceptances
1981	324/16,814	249/11,741
1982	166/13,076	328/19,642
1983	202/12,742	174/12,633
1984	198/12,801	173/10,489
1985	318/22,213	180/10,662
1986	266/12,459	233/20,806

STATEN ISLAND: Plans/Units

	Submissions	Acceptances
1981	5/459	2/186
1982	4/287	2/186
1983	2/77	4/233
1984	3/195	3/135
1985	2/212	2/293
1986	9/921	3/261

[1] The chart was derived from information obtained by counsel from the New York State Attorney General's Office and from Hinds, *Co-Op Hunting in the Other Boroughs*, N.Y. Times, Jan. 18, 1987, §8, p. 1, col. 2.

BROOKLYN: Plans/Units

	Submissions	Acceptances
1981	147/5,655	106/2,206
1982	114/6,062	136/5,929
1983	118/4,375	124/8,653
1984	151/5,983	119/4,125
1985	261/8,728	207/5,559
1986	246/9,557	191/7,268

BRONX: Plans/Units

	Submissions	Acceptances
1981	27/3,746	11/2,267
1982	17/1,198	37/4,166
1983	9/540	21/1,528
1984	23/1,967	9/778
1985	14/1,429	21/1,816
1986	46/5,575	13/1,342

QUEENS: Plans/Units

	Submissions	Acceptances
1981	96/12,435	17/2,585
1982	87/13,698	99/13,243
1983	41/4,889	88/13,780
1984	72/9,316	54/6,091
1985	113/15,165	73/10,387
1986	107/13,754	89/10,387

II. *Section 3607 Should Not Be Interpreted to Include Any Type of Lease*

The Second Circuit impermissibly amended Section 3607 of the 1980 Act to apply to "leases of cooperative owned property to a sponsor affiliated company" (815 F. 2d at 197 n.4) under the guise of statutory interpretation. *Fedorenko v. United States*,

449 U.S. 490, 513 (1981) (" 'We are not at liberty to imply a condition which is opposed to the explicit terms of the statute . . . . To [so] hold . . . is not to construe the Act but to amend it.' ") (quoting *Detroit Trust Co. v. The Thomas Barlum*, 293 U.S. 21, 38 (1934)). By its terms Section 3607 provides that cooperative unit owners have the right to terminate "any contract" with a developer or its affiliates which "provides for operation, maintenance or management of . . . a cooperative association in a conversion project or property serving the . . . cooperative unit owners in such project." 15 U.S.C. 3607 (a)(1). Even though the 1980 Act does not define the term "contract", Congress clearly had the power to include leases within the scope of Section 3607 if it so intended.[2] Instead, Congress adopted Section 3608 to give cooperative unit owners the right to terminate unconscionable leases under certain circumstances. The creation of two separate remedial provisions within the 1980 Act evidences the Congressional intent that Section 3607 should not be applied to leases of any type. *See Russello v. United States*, 464 U.S. 16, 23 (1983) (where Congress included particular language in one section of the statute but omits it in another section, it is presumed Congress acted intentionally and purposely).[3]

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[2] Indeed, state legislatures which have adopted statutes similar to Section 3607 have explicitly included leases within the scope of such statutes. *See, e.g.* Fla. Stat. § 719.302(1) (1987); Md. Real Prop. Code Ann. §11-133 (1981).

[3] The *Fedorenko* decision provides clear guidance on this point. There, the lower courts had interpreted Section 2(a) of the IRO Constitution to provide an exception to its definition of displaced persons for those who voluntarily assisted in the persecution of civilians during the Second World War, even though the statute did not so qualify such assistance. In rejecting this construction of the IRO Constitution, this Court stated:

> The plain language of the Act mandates precisely the literal interpretation that the District Court rejected: an individual's service as a concentration camp armed guard — whether voluntary or involuntary — made him ineligible for a visa. *That Congress was perfectly capable of adopting a "voluntariness" limitation where it felt that one was necessary is plain from comparing §2(a) with §2(b), which excludes only those individuals who*

(Footnote continued)

This Congressional intent is further evidenced by the disparate treatment of contracts and leases under the remedial scheme of the 1980 Act. Under Section 3607 the simple agreement of two-thirds of the cooperative unit owners is necessary to terminate a contract with a developer or its affiliate. 15 U.S.C. §3607(a). On the other hand, Congress imposed far greater conditions and limitations on the rights of cooperative unit owners pursuant to Section 3608 of the 1980 Act. Cooperative unit owners exercise their rights under Section 3608 only upon a showing to a court that the lease is unconscionable according to specific statutory guidelines. 15 U.S.C. §3608(b), (c). Congress further limited cooperative unit owners' rights under Section 3608 by narrowing the scope of the statute to leases entered into prior to June 4, 1975 and by refusing to give Section 3608 any prospective effect. 15 U.S.C. §3608(a), (b); *see* 126 Cong. Rec. 28,179 (1980); 126 Cong. Rec. 28,444 (1980); S. Rep. No. 736, 96th Cong., 2d Sess. 172, *reprinted in* 1980 U.S. Code Cong. & Ad. News 3506, 3717. Thus, it is clear from reading the 1980 Act that Congress intended that leases were not to be considered contracts under Section 3607.*

Nevertheless, the Second Circuit maintained that its interpretation of Section 3607 is consistent with Congressional

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> "*voluntarily assisted the enemy forces . . . in their operations* . . ." Under traditional principles of statutory construction, the deliberate omission of the word "voluntary" from §2(a) compels the conclusion that the statute made all those who assisted in the persecution of civilians ineligible for visas.

449 U.S. at 512 (footnote omitted; emphasis added). The same analysis should be employed to interpret Section 3607.

* The remedial scheme within the 1980 Act is no more than a reflection of the common law distinctions between contracts and leases. The law has long recognized that leases cannot be treated as simple contracts because they create valuable estates in land. As a result, a court will enforce the terms of lease through the equitable remedies of specific performance or injunctive relief. 5A Corbin on Contracts § 1143 at 131 (1964). Such remedies are rarely available in most contract actions.

intent. The court reasoned that whereas Section 3608 only applies to leases where the cooperative association is the tenant, its construction of Section 3607 applies to leases where the cooperative association is the lessor. 815 F.2d at 197. However, this is a meritless distinction without any support in the legislative history of the 1980 Act. It is inconceivable that Congress would require judicial intervention and strict standards of proof to terminate a lease under Section 3608 where the developer would retain a fee estate, yet allow cooperative unit owners unfettered discretion to terminate a lease under Section 3607, thereby ousting the developer from a leasehold estate. Such a result would violate the basic equitable maximum that a forefeiture of a leasehold estate is to be avoided whenever possible. *See* D. Dobbs, Remedies § 5.6 at 352-53 (1973).

In further support of its interpretation, the Second Circuit observed that Section 3607, taken literally, would lead to the "anomalous" result that "a *contract* for the operation of a laundry room, where the developer retained a fair percentage of the profits would be terminable, while a *lease* for the same laundry room space where the laundry room-tenant (developer) paid a below market fixed-rent would not be." 815 F.2d at 198 (emphasis in original). Even though the court may have correctly perceived a flaw in the remedial scheme of the 1980 Act, it may not disregard the Congressional intent to treat contracts and leases differently in order to remedy this deficiency. It is the function of Congress, not the Second Circuit, to fill the perceived gaps in the 1980 Act. *See Badaracco v. C.I.R.*, 464 U.S. 386, 398 (1984) ("Courts are not authorized to rewrite a statute because they might deem its effect susceptible of improvement. . . .")

Finally, the Second Circuit's construction of Section 3607 will create a flood of litigation as cooperative unit owners rush to the courts to expand the scope of the decision in this action. One noted expert has observed that cooperative associations will use the decision of the Second Circuit to unwind the creation

of "condops"[5] as an impermissible evasion of the 1980 Act. Brooks, *Sponsors; Conflicts on Master Leases*, N.Y. Times, May 10, 1987, §8, p.9, col. 1. It has also been observed that the decision of the Second Circuit will "generate lawsuits over the kind of amenities that can be deemed to service both residents and the public and thus clearly be covered by the [Second Circuit] decision — suites of doctors offices, health clubs and the like." *Id.* Indeed, Section 3607, as interpreted by the Second Circuit, will become a mere negotiation ploy for cooperative associations rather than a remedy for the purported abusive practices of developers. *Id.*

In light of the questionable nature of the Second Circuit's construction of Section 3607 and serious consequences which will result therefrom, the petition of the West 14th Street Corps. for a writ of certiorari should be granted.

III. *Section 3607, As Construed By the Second Circuit, Should Not Be Applied to the Leases at Issue*

The 1980 Act was proposed and adopted in response to abuses in condominium leasing in Florida, whereby developers leased recreational facilities to owners' associations and required their members to pay escalating rental charges. *See* 126 Cong. Rec. 15,963 (1980); 126 Cong. Rec. 16,081 (1980); 126 Cong. Rec. 28,174 (September 30, 1980); S. Rep. No. 736, 96th Cong., 2d Sess. 95-96, *reprinted in* 1980 Code Cong. & Ad. News 3506, 3600-01. As demonstrated above, the greatest potential for application of the 1980 Act is not to be found in Florida, but rather in New York. It is, therefore, essential that courts apply the 1980 Act in New York consistently with the state's regulatory scheme governing cooperative conversion. Indeed, such application would be consistent with Congress' expressed intent that the 1980 Act be compatible with state law. *See* 15 U.S.C. §§3610, 3615. *See also* 15 U.S.C. §3605.

New York has the "most comprehensive set of laws and regulations in the nation dealing with rental apartment conversion

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[5] A "condop" requires the filing of a condominium plan which provides for the subdivision of the building into a commercial unit and a residential unit and which simultaneously converts the residential unit to cooperative ownership. Typically, the developer retains the commercial unit.

to cooperative housing." *Cooperative Conversion*, 11 Fordham Urb. L.J. at 1089. Indeed, it is the expressed public policy of New York " 'to encourage conversion of residential property to . . . cooperative status, with adequate safeguards for the rights of both tenants and the sponsor of the conversion.' " *Id.* at 1103 (quoting 2 Report of the New York State Temporary Commission on Rental Housing, Ch. 2 at 2-111 (1980)).

In effectuating this public policy, New York State has adopted the Martin Act. Section 352-eeee of the Act provides that a non-eviction plan of conversion "may not be declared effective until written purchase agreements have been executed and delivered for at least fifteen percent of all dwelling units in the building . . . by bona fide tenants in occupancy or bona fide purchasers who represent that they intend that they . . . will occupy the dwelling unit." N.Y. Gen. Bus. Law §352-eeee 2(c)(i). An eviction plan of conversion cannot become effective unless "at least fifty-one percent of the bona fide tenants in occupancy" execute written agreements to purchase units under the plan. *Id.* §352-eeee 2(d)(i). Any conversion plan must become effective within fifteen months of the acceptance of the offering plan by the Attorney General; if the plan does not become effective within the statutory time period, a new plan may not be submitted to the Attorney General's office for twelve months. *Id.* §352-eeee 2(a).

As a result of these statutory requirements,[6] a developer in practice cannot simply impose the terms of the conversion on existing tenants and must by neccesity negotiate with them.[7] As one commentator has observed,

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[6] The negotiation process is further encouraged by the enforceability of "no-buy" pledges, which bind signatories not to purchase their apartments until released from the pledge by their fellow tenants. Goldsmith at 48

[7] In granting petitioners' motion for summary judgment, Judge Whitman Knapp of the Southern District of New York recognized this reality by finding that the leases at issue "were the result of arms-length bargaining conducted over the period of more than a year." 625 F. Supp. at 942-43 (footnote omitted). His decision thereby correctly stresses the importance of the negotiation process.

> During the progress of negotiations, it is important for all involved to remain aware of the fifteen and twelve-month time limitations imposed by 352-eeee after which the plan, if not declared effective, must be abandoned. *The scope of negotiations may encompass* every aspect of the offering, typically including such items as price, guarantees of operating costs, financing in connection with purchase of the entire premises as well as that of individual interests (including sponsor financing), buy-back offers, sponsor contributions to working capital funds, *leases or other arrangements for commercial space*, renovation and refurbishments and, in eviction plans, extended occupancy rights for non-purchasing tenants.

Goldsmith, Real Estate Financing, Practice Commentary to N.Y. General Business Law 44 (1984) (emphasis added).

In light of the practical effect of this state regulatory scheme, a New York sponsor is precluded, for all intents and purposes, from possessing "special developer control", which the 1980 Act defines as "any right arising under State law . . . through which the developer may control or direct the unit owners' association or its executive board." 15 U.S.C. §3603(22). The Martin Act therefore has a crucial impact on the operation of Section 3607 because the statute only applies to a "contract" that has been "entered into while such association was controlled by the developer through special developer control." 15 U.S.C. §3607(a)(3).

The Second Circuit erred in applying Section 3607 to the leases at issue in this action where, by operation of law, the sponsor could not exercise "special developer control". The court specifically found that the Martin Act prevented the developer in this action from going forward with the conversion, and entering into the leases, until the parties had agreed to the terms of the conversion. 817 F.2d at 190-91. Yet the Second Circuit ignored these facts as contrary to the Congressional attempt to create a non-judicial remedy for self-dealing contracts because

consideration of negotiations "would allow developers to plead tenant negotiation as a defense to a Section 3607 termination [which] would force every termination into litigation." *Id.* at 200. This argument is misguided in that the circumstances under which developers and tenants negotiate raises the fundamental question of the application of Section 3607. Moreover, the Second Circuit's concern that cooperative unit owners would be forced into litigation is wide of the mark in light of the demonstrated desire of such owners to use the courts and the Second Circuit's decision to expand their rights under Section 3607. See pp. 8-9 *supra*.

In view of the Second Circuit's erroneous application of Section 3607 in this action, the petition of the West 14th Street Corps. for a writ of certiorari should be granted.

CONCLUSION

For the foregoing reasons, the Council, as *amicus curiae*, respectfully submits that petitioners' writ should be granted.

Respectfully,

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